and it was under this statutory provision of the Act that the appellants were asking the learned Judge to exercise his jurisdiction, pending the determination of the disputes of the parties by arbitration. Since the appointment of an arbitrator had been made, we are of the opinion that in the exercise of his discretionary statutory power under section 13(6)(h) of the Act the main consideration of the Court is whether or not the *status quo* ought to be preserved. In such a case like the present, the principles enunciated by Lord Diplock in *American Cyanamid case* does not apply to such an application. We do not think that Lord Diplock had this sort of application in mind when he stated his principles in such wide terms.

Before considering the main issue, we remind ourselves of the limited function of an appellate court in an appeal of this nature. As stated earlier, an interlocutory injunction is a discretionary relief vested in the High Court Judge by whom the application was heard. Our function on hearing an appeal, therefore, is not to exercise our own independent discretion and defer to the Judge's exercise of discretion or interfere with it unless the Judge's discretion was based on a misunderstanding of the law or of the evidence before him or on wrong inferences of particular facts drawn by him or where no reasonable Judge regardful of his duty to act judicially could have reached the decision. Initially, the function of the appellate court is one of review only. It is only where the appellate court has reached the conclusion that the Judge's exercise of his discretion must be set aside for one of the reasons stated above that it becomes entitled to exercise an original discretion of its own. (Per Lord Diplock in *Hadmor Productions Ltd. & Ors.* v. *Hamilton & Ors.*[3]). It is clear in this case that the learned Judge misconstrued *American Cyanamid* as explained earlier. We are therefore entitled to exercise our own discretion.

In the instant case, the learned Judge has ordered that an arbitrator be appointed under section 12 of the Act, but refused to order interlocutory injunction. The question that has arisen is whether the court should have made such order as empowered under section 13(6)(h) of the Act pending determination of the disputes by arbitration. As stated earlier, the main consideration is whether the *status quo* ought to be preserved and in considering this the court must determine the matter on the balance of convenience. Considering the facts and circumstances of the case, we are satisfied that the balance of convenience does not favour the *status quo* to be preserved because it will result in the work of extracting timber in the concession area coming to a standstill. The respondents have been issued with a permit by the Forestry Department to fell and extract timber in the said area in lieu of the appellants. (See page 22 paragraph 28 of the affidavit of the appellants' managing director). The appellants' conduct as shown from the affidavits and the relevant documents filed should also be taken into consideration in support of the above. They appeared to have admitted of attempting to ship timber logs out of Sarawak without a valid sale contract on September 9, 1982 and to have undertaken not to repeat it after being served with a notice by the respondents of such breach. However, the respondents alleged that the appellants repeated a similar breach on or about September 21, 1982 and had thereby placed them in danger of their timber licence being cancelled by STIDC. We are also satisfied from the facts and circumstances of this case that damages will be an adequate remedy to the appellants for the expenditure that they have incurred if they take court action and succeed in proving that the contract has wrongly been terminated by the respondents.

For the reasons stated above, we dismiss the appeal with costs.

Deposit to the respondents to account for taxed costs.

Appeal dismissed.

Solicitors: *Yong & Wong; Reddi & Co.*

FABER MERLIN (M) SDN. BHD. & ORS. v. LYE THAI SANG & ANOR. TAN KIM CHUA REALTY (M) SDN. BHD. v. LYE THAI SANG & ANOR.

[S.C. (Abdul Hamid C.J. (Malaya), Wan Suleiman & Seah S.C. JJ.) March 11 & May 18, 1985]

[Johore Bahru – Federal Court Civil Appeals Nos. 79 and 90 of 1984]

Contract – Building contract – Multi-storey complex – Common property – Amendments to building – Service charges – Equitable remedy – Declaration – Discretion of Court – Limitation Act, 1953, s. 32.

Evidence – Construction of written contract – Extrinsic evidence – Evidence Act, 1950, s.92.

Tan Kim Chua Realty (M) Sdn. Bhd. (1st appellant) were the owners of a multi-storey complex, the Merlin

Tower Johore. Subsequently they sold the complex to Faber Merlin (M) Sdn Bhd (2nd appellant). The first appellants had earlier sold a parcel in the complex No. 212 on the 2nd floor to the respondent. Under the agreement, certain parts of the complex was stated as "common property". The first appellants subsequently built a mezzanine floor and converted a portion of the ground floor passage way into a hotel lobby. They sold the basement car parks, the mezzanine floor and the hotel lobby to the 2nd appellant, who in turn transferred them to the 3rd & 4th appellants. The 3rd appellant then applied for separate titles for the car park, mezzanine floor, the hotel lobby and the roof garden. The respondents asserted that these places were "common property" under the agreement and they asked for a declaration to that effect. They also sought to apply for an injunction to restrain the 3rd appellant from applying for the issue of separate titles and for further amendments to the building plans. They also sought for a declaration that the 3rd appellant should render accounts showing how the service charges for the respondent's parcel as well as those for other parcels in the complex are determined. The learned trial judge found in favour of the respondents and made an order in terms of their prayers in the originating summons. The appellants appealed.

Held: (1) given its simple grammatical construction common property according to the agreement is (a) the portion or portions of the lot on which the multi-storey complex stands; (b) the remainder of the complex itself minus (i) the individual parcels of business and office premises and (ii) the basement car parks;

(2) the first appellant was within his right under the agreement in carrying out those amendments to the building plan resulting in the construction of the hotel lobby, the mezzanine floor and the roof garden;

(3) service charges are governed only by the terms of the agreement. There is no reason to justify the making of a declaration as sought by the respondents;

(4) in any case since what was sought was an equitable remedy, there was evidence of laches, acquiescence and delay on the part of the respondents so that discretion should not be exercised in their favour.

Cases referred to:

(1) *Wickman Tools* v. *Schuler A.G.* [1974] A.C. 235, 261.

(2) *Dyson* v. *Attorney-General* [1911] 1 K.B. 410, 417.

SUPREME COURT.

Raja Abdul Aziz Addruse (G. Sri Ram with him) for the appellants in FCCA 79/84

S. Balarajah for appellants in FCCA 90/84

Arthur Lee (Gary Yuen and *Yap Siang Cheng* with him) for the respondents.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (delivering the Judgment of the Court): The two appeals, FCCA 79/84 and FCCA 90/84 were heard together. The appellants in FCCA 79/84 being defendants Nos. 2, 3 & 4 and the appellant in FCCA 90/84 defendant No. 1 in the court below.

It would be convenient to refer to appellant in FCCA 90/84 as 1st appellant and to those in FCCA 79/84 as 2nd, 3rd & 4th appellants respectively. The following are the facts as found by the learned trial Judge, and are not disputed in this appeal. 1st appellant is the owner of a multi-storey complex, the Merlin Tower Johor (herein after referred to as "the complex"). On April 1, 1977 it entered into an agreement with the plaintiffs (Pages 17 to 30 of the Records in FCCA 79/84) by which it sold to them a parcel in the complex, No. 212 on the second floor.

On or about July 1980, it sold the complex to the 2nd appellant. 3rd appellant then became the owner of the podium block and the office units. 4th appellant later acquired the hotel lobby and the car parks. Apart from the transaction between the respondents and 1st appellant it is not clear precisely when 2nd, 3rd and 4th appellants made their respective acquisitions.

Under Clause 8.04 of the agreement, it is provided that certain parts of the complex is "common property". Subsequently the 1st appellant built a mezzanine floor within the 24 feet void between the roof garden and the fifth floor, and converted a portion of the ground floor passageway into a hotel lobby. It sold to 2nd appellant the basement car parks, the mezzanine floor and the hotel lobby. The latter later transferred them to the 3rd and 4th appellants. The 3rd appellant then applied for separate titles for the car park, mezzanine floor, the hotel lobby and the roof garden.

The respondents asserted that these places were "common property" under the agreement and by way of Originating Summons asked for a declaration to that effect; and further declarations that the construction of the mezzanine floor and the conversion of the void into a hotel lobby were unreasonable as contrary to Clause 1.01(f) alternatively, the sites chosen were common property; that the sale of the property to the 2nd and the other appellants were *ultra vires* the agreement and void.

They also sought to obtain an injunction to restrain the 3rd appellant from applying for the issue of separate titles and for applying to the authorities for further amendments to the building

plan under the agreement, and a further declaration that pursuant to clause 1.01(2) of the agreement, the 3rd appellant should render accounts showing how the service charges for respondents' parcel as well as those for the other parcels in the complex are determined.

The learned trial judge listed four issues for determination between the parties:—

(a) whether the car parks are "common property" within the meaning of the agreement;

(b) whether the mezzanine floor, hotel lobby and the roof garden were sited on the common property. If they were, whether the amendments made to the plan which render them not common property were *ultra vires* the agreement;

(c) whether the plaintiffs were entitled to an account levied on the service charges;

(d) whether the delay in bringing the action defeats the plaintiffs' case.

The following facts were agreed upon before the hearing in the court below:—

(1) The original approved building plan submitted by the First Appellant did not have the hotel lobby and mezzanine floor.

(2) The amended approved building plan submitted by the First Appellant was approved on October 30, 1979. It contained amendments sought by the First Appellant. The amendments were the inclusion of the hotel lobby and mezzanine floor.

(3) The First Appellant had applied for strata titles on May 25, 1978 and no application was made for strata titles for the following areas – the basement car parks, the hotel lobby and the mezzanine floor. There is fresh application for strata title for the three areas and the roof garden.

The learned trial judge found in favour of the respondents on all counts and made an order in terms of their prayers in the Originating Summons.

Raja Abdul Aziz for the appellants (Mr. Balarajah for 1st appellant having adopted his submission in its entirety) listed the four principal issues in a somewhat different form but since these are substantially the same as the four dealt with by the learned trial judge and received without demur by counsel for the respondents, we should adopt this version.

First, which part of the complex constitutes "common property".

Clause 1.01(j) of the agreement reads: "wherever used in this agreement, unless the context shall otherwise require the following expression shall have the following meanings:—

(j) 'common property' means in relation to this Multi-Storey Complex that portion or portions of the Said Lot on which the Multi-Storey Complex stands together with so much of the Multi-Storey Complex as is excluded from the individual parcels of business and office premises but excludes the basement car parks."

The learned trial judge reasoned that the second negative must necessarily qualify and govern the clause immediately preceding it and not the prior main clause. As a result he decided that the basement car park was part of "common property".

The respondents had tried to introduce evidence of subsequent conduct, a move which found favour with the trial judge and such evidence clearly had the effect of fortifying his earlier view. It relates to that part of the agreed facts wherein it was admitted that whilst 1st appellant applied for strata title on May 25, 1980, no application was made for strata title for the three areas contended to be common property including the basement car parks until somewhat later.

Respondents had also sought to introduce evidence to the effect that the Managing Director of the 1st appellant had, at the time respondents had purchased the property, said that the basement car parks were not for sale and that the income derived therefrom would be used to subsidise the service charges.

Raja Abdul Aziz relies on the rule reiterated in *Wickman Tools* v. *Schuler A.G.*[1] (at Page 261) which reads,

"The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used."

Section 92 of the Evidence Act is substantially to the same effect. Learned Counsel for respondents contends that section 92 (f) of the Act – "any fact may be proved which shows in what manner the language of the document is related to existing facts" permits him to refer to that part of the agreed facts (Pages 2 and 3 of Supplementary Appeal Record) wherein 1st appellant had made a separate application for strata title to the basement car parks, hotel lobby mezzanine floor and roof garden as an aid to construing the agreement.

We are not persuaded that there is any ambiguity in that part of the agreement which would justify ignoring the general rule against admission of extrinsic evidence.

Given its simple grammatical construction therefore common property is (1) the portion or portions of the Lot on which the Multi-Storey Complex stands; (2) the remainder of the complex itself, minus (i) the individual parcels of business and office premises, and (ii) the basement car parks.

Secondly, what are the respective rights of purchaser and vendor to common property?

It is not in dispute that strata titles have as yet never been issued in this country, and that no register of strata titles exists. The importance of this fact is that the provisions of the National Land Code is irrelevant for the purpose of construing this agreement so that we would have to confine ourselves to the agreement itself to determine the rights of the parties.

The learned trial judge was of the view that clause 8.04 gave the purchasers unrestricted right to use the common property, despite clause 1.01(f) thereof which entitles the vendor to make reasonable amendments to the building plan, and clause 10.02 which says that any amendments to the building plans shall not annul this contract of sale nor be subject to any claims for damages or compensation by or against any party to this agreement.

Clause 8.04 deserves to be set out in full and reads:–

"The Vendor undertakes that subject to such restriction of use which the Vendor or the Management Corporation may deem fit to impose the parcel is sold and that all other parcels shown on the Floor Plan are also sold TOGETHER with the free right and liberty for the Purchaser and his servants agents licensees and invitees in common with the Vendor and all other persons having the like right and liberty at all times and for all purposes whatsoever connected with the use and enjoyment of the parcel or other parcels shown on the Floor Plan to pass and repass along over and upon all the Common Property TOGETHER also with the full right and liberty to make all necessary connections and thereafter to use in a proper manner the drain pipes cables or wires laid or constructed by the Vendor under or over the Said Lot for the purpose of the supply of water electricity and telephone services to and for drainage of water from the parcel."

For the appellants it was urged that certain clauses of the agreement, for example clause 7.01 – payment of outgoings, clause 7.08 – restriction to alteration of parcel, clause 7.10 – restriction to use of parcel and clause 8.04 itself as being some of a number of restrictions which the vendor can impose on the purchasers (respondents). It follows that there being not as yet a Management Corporation, the construction of the mezzanine floor and the hotel lobby are such restrictions to the common property which the vendor can impose under clause 8.04.

Moreover the specific provisions permitting amendment to the plan *viz.* Clauses 1.01(f) and 10.02 have not been given due weight by the learned judge in his consideration of respondents' rights to common property under clause 8.04.

Though we agree with Mr. Lee that the words "use and enjoyment" in clause 8.04 does not merely mean the right to pass and repass, they most certainly do not confer the outright proprietor's rights which both the learned trial Judge and respondents appear to think these words confer. We are satisfied clause 8.04 defines respondents' entitlement with sufficient clarity. With respect we would also differ from the learned trial judge and hold that the combined effect of clauses 1.01(f) and 10.02 would be that reasonable amendments to the building plans are things respondents had agreed from the very start to accept without demur.

Indeed, apart from such reasonable amendments which the latter two sections allow, clause 8.04 itself makes respondents' rights to "use and enjoyment" subjected to "such restrictions as the vendor or Management Corporation may deem fit to impose".

Thus we find ourselves unable to accept the learned trial judge's view that only such amendments to the building plan as would enhance the value of the existing rights of the respondents are permissible.

To succeed, the respondents would have to show that the amendments were unreasonable, which in the circumstances we find that they have not succeeded in doing.

We would therefore hold that the 1st appellant was within his right under the agreement in carrying out those amendments to the building plan resulting in the construction of the hotel lobby, the mezzanine floor and the roof garden.

Service charges – whether vendor or owner

i.e. 1st appellant should render accounts for the purpose of service charges.

Service charge is defined in clause 1.01(1) and the rate is determined by the vendor under clause 7.11.

Raja Abdul Aziz submits that since the provision of the National Land Code does not apply at the moment, there is no question of accounts being provided by the 1st appellant to the respondents as purchaser, as required by them in the Originating Summons.

The respondents clearly had in mind the provision of section 364(4) of the National Land Code which is set out hereunder:—

"The management corporation shall on the application of a subsidiary proprietor or any person or body authorised in writing by him certify –

(a) the amount of any contribution determined as the contribution of that proprietor;

(b) the manner in which the contribution is payable;

(c) the extent (if any) to which the contribution has been paid; and

(d) the amount of any rate paid in respect of that proprietor's parcel by the management corporation under section 367 and not recovered by it

and in favour of any person or body dealing with that proprietor the certificate shall be conclusive evidence of the matters certified."

We are inclined to agree with counsel. Service charges are governed here only by the terms of the agreement, and we can see no reason to justify making such declaration. Under the present circumstances, it is the vendor who will determine it and until the parcel has been given its "share value" on the issue of a subsidiary title under section 157 of the National Land Code, service charges will have to be determined by the vendor. We cannot agree with Mr. Lee that because this "share value" for the parcel has not been determined, service charges cannot likewise be determined. Envisaging delay in the issue of subsidiary titles, provision has been made for its determination by the vendor under clause 1.01(i).

Fourthly are respondents entitled to the various declarations they seek?

It was argued on behalf of the appellants that declaratory judgment being an equitable remedy should be governed by equitable principles. We referred to *The Declaratory Judgement by I. Zamir (1962), at Page 191* the relevant part of which reads:

'The equitable origin, however, has left its mark on the remedy. This is especially evident in its discretionary nature. This discretion is employed ... primarily to do justice in the particular case before the court ..... In another action, the court held that the plaintiff had waived his right to take the proceedings and, further assumed that the claim might also be dismissed on the ground of undue delay ("laches")."

The learned Judge had been mistaken, counsel said, when he noted (at Page 184 of the Records) "that no plea was ever made in any of the defendants' affidavits that the plaintiffs be estopped from bringing the action because they were guilty of laches". The Assistant Manager for the 3rd appellant had in his affidavit raised this very point, having alleged that the respondents, being aware since at least 1978 of the existence of the mezzanine floor and the hotel lobby had been guilty of laches or undue delay in taking no steps to claim relief until the filing of the Originating Summons on May 23, 1983. As in *Dyson* v. *A.G.*[2] we are urged to consider, in the exercise of our discretion whether to make this declaration or not in the circumstances of this case, particularly since granting the declaration would amount to an order for the demolition of the lobby and mezzanine floor.

Mr. Lee's reply to this is that if at all, there is any defence to delay in the present appeal it will be limitation rather than laches. Even then only 1st appellant can possibly raise it, since his agreement with respondents was executed on April 1, 1977. Presumably even 1st appellant cannot do so because any breach of the contract would be within the 6 years limitation period. This argument we would reject outright for section 32 of the Limitation Act 1953 states that:

"Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise."

The answer to the first two issues would make it quite superfluous to deal with this issue.

In any case, even if an answer to this latter two issues had been otherwise, there is evidence of laches, acquiescence and delay on the part of respondents so that discretion should not be exercised in their favour.

For these reasons we would allow this appeal with costs.

Appeal allowed.

Solicitors: *Sri Ram, Zulkifly & Kumar; Balarajah & Co.; Arthur Lee & Co.*